DOCUMENT RESUME

ED 473 363 EA 032 382

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TITLE	Resurrection of the Eleventh Amendment: Are the Rights of Special Education Students in Jeopardy?
PUB DATE	2002-11-00
NOTE	11p.; In: Balancing Rights: Education Law in a Brave New World. Papers [of the] Education Law Association (ELA) Annual Conference (48th, New Orleans, LA, November 14-16, 2002); see EA 032 361.
PUB TYPE	Information Analyses (070) -- Speeches/Meeting Papers (150)
EDRS PRICE	EDRS Price MF01 Plus Postage. PC Not Available from EDRS
DESCRIPTORS	Civil Rights; *Constitutional Law; Court Litigation; *Disabilities; Elementary Secondary Education; Federal Courts; Postsecondary Education; *Special Education; State Courts; *Student Rights
IDENTIFIERS	Eleventh Amendment; Supreme Court

ABSTRACT

The 11th Amendment, ratified in 1798, has proved itself a great source of discussion, even confusion, among many courts in this country. Historical background on the development of the 11th Amendment and its interpretations in different cases sets the context for the rest of this paper, the theme of which involves state immunity from federal suits. Although language of the amendment preserves the sovereign immunity of the states, it is settled that this protection extends also to state agents, state instrumentalities, and regents. This extension does not, however, reach to counties and municipalities. Consequently, there are some county school districts that do not enjoy such immunity from federal suits. It remains to be seen how this split plays out in the area of lawsuits brought for alleged violations of federal law governing special education and disabled students. In the area of rights of students with disabilities, as with other federal laws, it remains to be seen whether a different but related Equal Protection issue will arise from the fact that students and parents in those several states that do not have 11th Amendment immunity may have differing access to the federal courts, depending on the varying degrees of state "consent." (RT)

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Resurrection of the Eleventh Amendment: Are the Rights of Special Education Students in Jeopardy?

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November 2002

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RESURRECTION OF THE ELEVENTH AMENDMENT: ARE THE RIGHTS OF SPECIAL EDUCATION STUDENTS IN JEOPARDY

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RESURRECTION OF THE ELEVENTH AMENDMENT: ARE THE RIGHTS OF SPECIAL EDUCATION STUDENTS IN JEOPARDY

I. Historical Context of the Eleventh Amendment

Amendment XI, Constitution of the United States:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State.

A. Background

The Eleventh Amendment, ratified by the States in 1798, has proven itself a great source of discussion, even confusion, among the various courts of the country. It came into existence in response to a case that prompted Congress to ask: What rights did the several states retain, or refuse to relinquish, after joining the United States under the Constitution? Could they be taken into federal court and subjected to damages? Some have suggested that Congress deliberately drafted ambiguity into the Amendment due to the lack of consensus on the answers to these questions. This is not surprising, given the considerable debate in which the Framers had engaged over how far to extend the power of the federal judiciary.[1] Ever since, while the text of the amendment has remained unchanged, it has been a malleable proclamation for the judiciary to attempt to shape, explain, and apply.

It started in 1793, when the Supreme Court held that Article III of the Constitution permitted a private citizen of another state to sue Georgia without its consent in *Chisholm v. Georgia*.[2] As a result, during the first meeting of Congress following this case, the Eleventh Amendment was proposed and ratified to essentially overturn *Chisholm*. Thus, the States retained their sovereign immunity and could not be brought before a federal court without their consent.

Over time the court grappled with the Amendment as noted in *Hans v. Louisiana*,[3] holding that it did intend to bar a citizen from suing his own State in federal court, unless that State had consented. Thus, said the Court, a State could not be sued by citizens of others States or citizens of that State on grounds arising under federal laws.[4] This had the practical effect of expanding

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[1] A concise, but informative discussion of this historical context is provided near the beginning of Justice Rehnquist's opinion in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).
[2] 2 Dall. 419 1793).
[3] 134 U.S. 1, 10 S.Ct 504, 33 L.Ed 842 (1890).
[4] *Id.* at 15.

the Amendment's influence as a bar to litigation beyond just jurisdiction cases to those involving all sorts of federal questions.[5]

Over the years, the courts have recognized three key exceptions to such immunity. First, citizens may sue a State official in federal court for injunctive relief from federal law or constitutional violations during the course of his official duties.[6] Second, a State may consent to suit by waiver. The standard for such waiver has become rather strict. As the U.S. District Court in Maryland confirmed, a State may waive its Eleventh Amendment immunity only by the "the most express language or by such overwhelming implications from the text [of the State statue] as will leave no room for any other reasonable construction."[7] Indeed, one type of waiver, constructive consent, recognized in *Parden* has since been overruled.[8] A third way to abrogate Eleventh Amendment immunity occurs under Congress' power to enforce the Fourteenth Amendment guarantees of equal protection of the laws and due process of law.[9] In particular, this third venue to avoid the bar against suing States has undergone recent refinements by the courts, with some of the most notable decisions issued in the past six years. For instance, up until 1996, it was generally accepted that Congress could simple abrogate the States' Eleventh Amendment immunity via its power derived from the Commerce Clause.[10] Even though Congress passed laws to enforce the post-Civil War Amendments (Thirteenth, Fourteenth, and Fifteenth),[11] generally it had relied on the power of the Commerce Clause.

However, in *Seminole Tribe of Florida v. Florida*,[12] the Court held that Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hand of private individuals. Thus, only the Post-Civil War "remedial" powers of Congress could be invoked to abrogate the States' Eleventh Amendment immunity and not the Commerce Clause. Remedial measures are those applied by Congress when States violate the Fourteenth Amendment.[13] In order for the federal government to intervene with remedial action, lawmakers must make a specific finding that the State or state agency has demonstrated a pattern of a particular civil rights violation. In *Seminole Tribe*, the Court

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[5] *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54,116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).
[6] *See Ex Parte Young*, 209 U.S. 123 (1908).
[7] *Jones v. Frederick County Board of Education*, 689 F.Supp.535 (1988) citing *Edelman v. Jordan*, supra, 415 U.S. at 673 (1974).
[8] *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board*, 527 U.S. 666, 119 S. Ct. 2199, 144 L.Ed.2d 605 (1999).
[9] *See Fitzpatrck v. Bitzer*, 427 U.S. 445 (1976).
[10] Article 1, Section 8 of the Constitution provides that Congress has the power "to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." This power has been deemed not only a source of congressional authority, but also a limitation on state power.
[11] In the wake of the Civil War, Congress enacted the Thirteenth, Fourteenth, and Fifteenth Amendments to incorporate an individual's constitutional rights to the states---freedom from slavery, freedom from infringements on life, liberty, and property without due process of law, and freedom to vote. With each of these Amendments came the power of Congress to enforce them against the states.
[12] *Supra* note 5.
[13] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Amendment XIV.

found that Congress failed to do this in enacting the Indian Gaming Regulatory Act.[14] Further, the remedial measure(s) Congress employs must be "congruent" and "proportional" between the injury to be prevented or remedied and the means adopted to achieve that end.[15]

In 1999, the Supreme Court issued opinions in two cases that further limited the application of federal law to the States. In *Alden v. Maine,*[16] the Court held that not only is a State immune from suit in federal court, but it is also immune in state court. *Alden* struck down Congress' authority to confer a right of action on State workers under the Fair Labor Standards Act (FLSA) in State courts. The reasoning behind this was that the State's immunity from private suits for money damages in its own courts was a "fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today."[17] The companion cases to *Alden* were *Fla. Prepaid Postsecondary Edu. Expense Board v. College Savings Bank*[18] and *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board.*[19] The latter by eliminating the "constructive" waiver that had been permitted under *Parden v. Terminal Railroad Company*[20] made it clear that a State can waive its Eleventh Amendment immunity only by an "unequivocal expression" and " clear declaration." Thus, the threshold to meet in order to bring the State before a federal court is very high.

More recently in *Kimel v. Florida Board of Regents,*[21] two associate professors, from the University of Montevallo in Alabama, held that they were discriminated against based on age with regard to evaluations and pay raises. In a related case, a group of current and former faculty and librarians from Florida State University including J. Daniel Kimel, Jr. argued that the Florida Board of Regents refused to require the state universities to allocate funds for previously agreed upon market adjustments to salaries of eligible university employers. Additionally, W. Dickson filed suit against the Florida Department of Corrections alleging that the state employer failed to promote him because of his age. Plaintiffs in all three cases appealed the decision of the lower court to the Court of Appeals for the Eleventh Circuit who held that the ADEA does not abrogate the State's Eleventh Amendment immunity.

Upon review by the United States Supreme Court, it was found that "although the ADEA does contain a clear statement of Congress' intent to abrogate the States' immunity, that abrogation exceeded

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[14] *Supra* note 5.
[15] *City of Boerne v. Flores*, 521 U.S. 507, 531, 117 S.Ct. 2157, 138 L.Ed. 2d 624 (1997). Holding that Religious Freedom Restoration Act of 1993 (RFRA) was not appropriate legislation under the Fourteenth Amendment because (a) there was only anecdotal evidence and it did not reveal a widespread pattern of religious discrimination in the country, and (b) the RFRA was far out of proportion to the supposed remedial or preventive object.
[16] 527 U.S. 706, 119 S.Ct. 1138, 144 L.Ed.2d 636 (1999).
[17] At least one federal court has observed that the phrase, "Eleventh Amendment immunity" is "convenient shorthand but something of a misnomer" as sovereign immunity was enjoyed by States before the Constitution's ratification. *See Breen v. Texas A&M Univ.*, 213 F.Supp.2d 766 (S.D. Tex. 2002), citing *Alden,supra* note at 17.
[18] 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed. 2d 575 (1999).
[19] *Supra* note at 9. Federal patent and trademark acts failed to abrogate immunity.
[20] *Supra* note at 7.
[21] 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000).

Congress' authority under section 5 of the Fourteenth Amendment."[22] In addition, Section 5 of the Fourteenth Amendment grants Congress the power to enforce substantive guarantees contained in section 1 by enhancing "appropriate legislations."[23] Of particular note is the court's position that the decision was not the end of the line for employees who find themselves subject to age discrimination and may recover money damages from their state employers in almost every State.

In *United States v. Morrison* [24] the Supreme Court held that the Violence Against Women Act,[25] could not be sustained under the Commerce Clause of the Fourteenth Amendment. In this case Antonio Morrison and James Crawford raped Christy Brzonkla who was enrolled at the Virginia Polytechnic Institute. This led to her becoming severely emotionally disturbed and depressed. She filed a complaint against the respondents based on the school's sexual assault policy. The Virginia Tech's Judicial Committee did not find sufficient evidence to punish Crawford, but Morrison who admitted to having sex with Brzonkla, despite her saying no twice, was suspended for two semesters. Morrison initiated a court challenge and the school conducted a second hearing where a second committee found him guilty, but changed the description of his offense from "sexual assault" to "using abusive language." Morrison appealed this second decision to the administrative system that set aside his punishment.

Brzonkla sued Morrison, Crawford, and Virginia Tech in the United States District Court citing section 13981 of the Violence Against Women Act[26]and Title IX[27] of the Education Amendment. Morrison and Crawford sought to dismiss the complaint on the grounds that it failed to state a claim and civil remedy was unconstitutional. The United States intervened. The District Court dismissed the claim and concluded that Congress lacked the authority to enact section 13981 under either the Commerce Clause or section 5 of the Fourteenth Amendment.[28] A divided panel of the Court Appeals reversed the District Court.[29] The Supreme Court reversed saying that Section 13981 cannot be sustained under the Commerce Clause or section 5 of the Fourteenth Amendment.[30] The Court stated that gender-motivated crimes of violence are not, economic activity and additionally noted that Congress invoked the Fourteenth Amendment as a source of activity to enact section 13981.

In *Garret v. University of Alabama at Birmingham Board of Trustees,*[31] a petitioner sued the state under the Americans with Disabilities Act (ADA)[32]. Facts of this case reveal that Patricia Garrett, a registered nurse, was the Director of Nursing, OB/GYN/Neonatal Services for the University of Alabama in Birmingham Hospital. In 1994, she was diagnosed with breast cancer underwent a lumpectomy,

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[22] *Id.*
[23] *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).
[24] 529 U.S. 598; 120 S. Ct. 1740; 146 L. Ed. 2d 658 (2000).
[25] 42 U. S. C. §13981(b)
[26] *Id.*
[27] 86 Stat. 373-375, 20 U.S.C. §§1681-1688.
[28] 935 F. Supp. 779; 1996 U.S. Dist. LEXIS 10766.
[29] 169 F.3d 820; 1999 U.S. App. LEXIS 3457
[30] 529 U.S 598,120 S.Ct. 1740 (2002).
[31] 531 U.S. 356; 121 S.Ct. 955; 148 L.Ed.2d 866 (2001).
[32] 42 U.S.C.§12112(a).

radiation, and chemotherapy. Having to take substantial time off work she returned in July 1995 and was required to give up her Director position. Garrett applied for a transfer and received a lower paying job as a nurse manager.[33]

In addition to Garret, Milton Ash, also of Alabama, brought a suit related to his disability. Ash worked as a security officer for the Alabama Department of Youth Services. He informed the Department that he suffered from chronic asthma and that his doctor recommended he avoid carbon monoxide and cigarette smoke. He requested that the Department modify his duties to minimize his exposure to these substances. Ash was later diagnosed with sleep apnea and requested based on his doctor's recommendation, that he be reassigned to the day shift. The Department granted neither of the requests. Ash then filed a discrimination claim with the Equal Opportunity Commission.

Garret and Ash filed separate lawsuits in District Court seeking monetary damages under the ADA. The District Court disposed of both cases by granting summary judgment claiming that the ADA exceeds Congress' authority to abrogate the Eleventh Amendment immunity. The cases were consolidated and on appeal the Eleventh Circuit reversed the lower court decision. The U.S. Supreme Court granted certiorari to resolve a split among the Court of Appeals question as to whether an individual may sue a State for money damages in federal court under the ADA.[34]

In its opinion, the Supreme Court held that state employees who brought lawsuits in federal court to recover monetary damages by reason of the State's failure to comply with Title I of the ADA are prohibited by the Eleventh Amendment. These recent decisions by the Supreme Court make it clear that section 5 of the fourteenth amendment cannot be used to abrogate the eleventh amendment. It appears that a person's right to sue a state has been diminished by these recent decisions. The Court has diminished federal powers and increased state powers, but in doing so has diminished individual civil rights. A political and moral issue is now at the forefront. Are the enumerated powers of Congress under the Fourteenth Amendment and the Commerce Clause diminished? Does this endanger Title II, ADA and Section 504, and IDEA or other legislation related to race, religious, and sex discrimination?

B. Are School Districts State Agencies to Which Eleventh Amendment Immunity Extends?

Although language of the Eleventh Amendment preserves the sovereign immunity of the "States," it is settled that this protection extends also to State agents, State instrumentalities, regents[35] or "arms of the State" and State officials.[36] However, this extension does not reach to counties and municipalities, even those that exercise a "slice of state power."[37] Consequently, there are also county school districts,

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[33] *Id.*
[34] *Id.*.
[35] 519 U.S. at 429.
[36] *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).
[37] *Id.* at 280,

in some States, which do not enjoy such immunity.[38] Thus, a threshold question in any case in which the school district raises an Eleventh Amendment immunity defense, is whether that particular board of education is to be treated as an arm of the state or, instead, as a local or municipal agency. The question will usually turn on the application of state law governing the classification of governmental entities.

Some factors have emerged to determine this question. For example, in 1988, the federal District Court in Maryland concluded unequivocally that a county board of education was an agent of the State and was therefore immune from suit in federal court under the Eleventh Amendment.[39] This was despite the acknowledgment that the boards in that State are, from a budgetary and structural perspective, local in character.[40]

In reaching its conclusion in *Jones*, the Court considered several factors to determine whether the local board was an agency of the State for immunity purposes including 1) state statutes and court decisions governing the local board; 2) the board's source of revenue; 3) the board's autonomy from the state government; 4) whether the board has the power to sue and be sued; 5) whether the board has the power to contract; and 6) whether the State would be responsible for a judgment against the entity.[41]

The Ninth Circuit considered the same issue in *Belanger v. Madera Unified School District*[42] and while that Court emphasized California's unusually close ties between the State and the local school districts, the points of analysis were essentially the same as in the Maryland case: (a) whether monetary judgment would be satisfied out of state funds; (b) whether the entity performs central governmental functions; (c) whether the entity may sue and be sued; (d) whether the entity has the power to take property in its own name or only in the name of the state; and (e) whether the entity has corporate status.

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[38] *See*, *Cash v. Granville County*, 242 F.3d 219 (4th Cir. 2001) Local school board, deemed "more like a county than an arm of the State" under North Carolina law, held not immune.

[39] *Jones v. Frederick*, 689 F.Supp. 535 (D.Md. 1988).

[40] *Chesapeake Charter, Inc. v. Anne Arundel County Board of Education*, 358 Md. 129, 136-139, 747 A.2d 625, 629 (2000). In Maryland, county school boards are considered generally to be state agencies because, among other reasons, the public school system in that state is a comprehensive state-wide system pursuant to the State Constitution's establishment throughout the state of a thorough and efficient system of free public schools; the fact that the entity locally carries out the state education policy and not the county government, and the local school boards are subject to extensive supervision by the State Board of Education in virtually every aspect of their operation that effects educational policy or the administration of the public schools in the county.

[41] *Id.*, at 537. *See Biggs v. Board of Education of Cecil County*, 2002 WL 371095 (March, 2002). Local board of education held immune from suit by disabled student for money damages under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act) citing Board of Trustees of the Univ. of Alabama, et al. V. Garrett, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). As discussed above, however, the State has the power to consent to suit and waive its immunity under the Eleventh Amendment. Maryland, like other States, has enacted laws that effectuate a partial such waiver. *See, e.g.*, Md. Code Ann., *Courts and Judicial Proceedings Article*, Section 5-518: "A county board of education, described under Title 4, Subtitle 1 of the Education Article, may raise the defense of sovereign immunity to any amount claimed above the limit of its insurance policy ... A county board of education may not raise the defense of sovereign immunity to any claim $100,000 or less." This means that a board can be liable for an amount of damages up to its insurance policy limits, $100,000 according to statute. However, the State and its officers and units are not liable for punitive damages.

[42] 963 F.2d 248 (9th Circ. 1992)

In *Breen v. Texas A&M University*,[43] the District Court found that Texas had not consented to a suit in federal court by individuals regarding the 1999 Bonfire collapse at Texas A&M University, nor had the State's sovereign immunity been abrogated or compromised by Congress with the passage of Section 1983. Accordingly, it ruled that the University was shielded from liability by its Eleventh Amendment immunity.[44] On the other hand, in *Cash v. Granville*,[45] the Fourth Circuit denied sovereign immunity for a North Carolina school district. Noting that such immunity derives from the original sovereignty of the State, not necessarily from the Eleventh Amendment – which "confirmed rather than established sovereign immunity as a Constitutional principle" – the Court observed that the "state treasury factor" is the "most salient factor in Eleventh Amendment determinations."[46]

C. Will School Districts Treated as State Agencies Be Immune to Lawsuits Under IDEA or Section 504?

In enacting IDEA did Congress demonstrate a "widespread pattern" of discrimination against students with disabilities?[47] Are the remedies provided for in IDEA or Section 504 congruent to and proportionate with the injury to be redressed or prevented?

In a case out of Arkansas, the Eight Circuit "reviewed the legislative history" at the time Congress passed IDEA, and found that "did not adequately identify the constitutional transgressions it sought to remedy when it enacted IDEA."[48] Moreover, to the extent Congress made factual findings about disabled students, it "did not find that the disparate treatment of [them] resulted from action by the states or, if it did, that such state action violated the Equal Protection Clause."[49]

Beyond these findings, the Court of Appeals also held that "IDEA's [Eleventh Amendment immunity] abrogation provision is invalid because IDEA is not an appropriate exercise of Congress'

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[43] 213 F.Supp.2d 766 (S.D. Tex. 2002).

[44] Previous decisions of the Fifth Circuit and district courts in Texas have consistently afforded Eleventh Amendment immunity to state universities, including Texas A&M. *See also*, *Hill v. Board of Trustees of Michigan State University*, 182 F.Supp.2d 621 (2001)(as an "arm of state," school immune from suit for damages or injunctive relief); *Hamilton v. City College of the City University of New York*, 173 F.Supp.2d 181, 184-85 (S.D.N.Y. 2001)(colleges of the CUNY system and their officials enjoy the State of New York's Eleventh Amendment immunity), citing *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, No. 00-9223, 2001 WL 1159970 (2d Cir. Sept. 26, 2001).

[45] 242 F.3d 219 (2001).

[46] *Id., at 225*, citing *Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997) and *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). No immunity for local board because, under Ohio law, "State" does not include political subdivisions, but political subdivisions do include school districts.

[47] *Supra* note 25 at 645.

[48] *Bradley v. Arkansas Department of Education*, 189 F.3d 745, (8th Cir. 1999), *rev. on other grounds sub nom. Jim C. v. United States*, 235 F.3d 1079, 1080 (8th Cir. 2000) (en banc), *cert. denied Arkansas Dept. of Education v. Jim C.*, 533 U.S. 949 (2001).

[49] *Id* at 751-52.

Section 5 power."[50] Notwithstanding its ruling on the abrogation issue, the Eight Circuit held that Arkansas still waived its immunity, as to the entire Department of Education (not just those specifically supported by statutory funds) when it chose to participate in federal spending programs created by IDEA[51] and accepted Section 504 federal funds.[52] At the same time, IDEA does not provide for compensatory or punitive damages, and a violation does not entitle a plaintiff to sue under Section 1983.[53] The purpose of IDEA and its procedural mechanisms is to promote free appropriate public education, "not to provide a forum for tort-like claims of educational malpractice."[54]

II. Conclusion

When the several States joined the United States by ratifying the Constitution, they retained certain rights.[55] While there has been heated debate (to say the least) about what those rights are, the Eleventh Amendment and the cases interpreting it solidified the States' immunity from federal suit unless one of the three exceptions applies. In some jurisdictions, local boards of education are state agencies for Eleventh Amendment purposes, but may still be amenable to suit under the exceptions. In others, the school districts are not considered state agencies, and, as such, they may be subject to suit in federal court. It remains to be seen how this split plays out, if at all, in the area of lawsuits brought for alleged violations of federal law governing special education and disabled students. And in the area of rights of students with disabilities, as with other federal law rights, will a different but obviously related Equal Protection issue arise from the fact that students and parents in the several States may have differing access to the federal courts, depending on the varying degrees of State "consent"?

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[50] *Id.* at 752, citing the ADA abrogation analysis in *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1008-09 (8th Cir. 1999).

[51] *Id.* at 753.

[52] *Jim C. v. United States* 235 F.3d 1079, 1080 (8th Cir. 2000) *See also, A.W. v. Jersey City Public Schools*, 2002 WL 1065685 (D.N.J. No. 01-CV-140, March 27, 2002) State and local school districts and officials denied sovereign immunity on ground they accepted federal funds. The two-prong test for abrogation of state immunity established by *Seminole Tribe* was applied in *A.W. v. Jersey City Public Schools*, *supra*. The district court found that the first prong had been met simply by looking to the plain language of the IDEA. However, the Court avoided addressing the second prong, instead ruling that it did not have reach that issue because the State had waived its immunity anyway by participating in the federal spending programs. *John T. v. Iowa Dep't. of Education*, 258 F.3d 860, 864 (8th Cir. 2001); *Board of Educ. of Oak Park and River Forest High School District No. 200 v. Illinois State Board of Education*, 207 3d 931(2000).

[53] *Sellers v. School Board of the City of Manassas, Virginia*, 142 L.Ed.2d 137 (1998).

[54] *Id.*

[55] U.S.C.A. Amendment X. "The powers not delegated to the United States by the Constitution, nor prohibited by the States, are reserved to the States respectively, or to the people."

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